Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-818

ADELINE KARLJOLIC,

Petitioner,

vs.

ILLINOIS BELL TELEPHONE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINION BELOW

There is no opinion of the United States Court of Appeals for the Seventh Circuit. An unpublished order is attached as Appendix "A" hereto. The summary judgment of the district court was affirmed from the bench by the Court of Appeals on April 27, 1979. A copy of the district court's opinion granting summary judgment is attached as Appendix "B".

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 30, 1979, a copy of which is set forth as Appendix "C", and a petition for rehearing was denied on August 27, 1979. The order of denial is reproduced at Appendix "D". The jurisdiction of the Supreme Court is invoked under Title 28 U.S.C. § 1254(1).

QUESTION PRESENTED

May a Court of Appeals affirm a district court's summary judgment in favor of an employer in an action under the Age Discrimination in Employment Act when the employee alleges material fact issues that she was "discharged" for age-related reasons in failing to qualify for a lateral job change, and the employer classifies the termination as an involuntary "retirement" pursuant to a bona fide pension plan which is not a subterfuge to evade the purposes of the Act, when there is evidence in the record that "retirement" was never contemplated by either party until *after* plaintiff allegedly failed to qualify for the lateral job change, and there was evidence that plaintiff had to be age 55 or more, with 30 or more years seniority to qualify to remain with the employer?

STATUTE INVOLVED

Age Discrimination in Employment Act.
Title 29 U.S.C. § 623.
[of 1967 and Amendment of 1978]

§ 623. Prohibition of age discrimination

Employer practices

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

Lawful practices; age as occupational qualification; other reasonable factors; seniority system; employee benefit plans; discharge or discipline for good cause

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual; or

(3) to discharge or otherwise discipline an individual for *good* cause.

Pub.L. 90—202, § 4, Dec. 15, 1967, 81 Stat. 603.

Lawful practices; age as occupational qualification; other reasonable factors; seniority systems; employee benefit plans; discharge or discipline for good cause

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

As amended Pub.L. 95—256, § 2(a), Apr. 6, 1978, 92 Stat. 189.

STATEMENT OF CASE

In December of 1976 petitioner was 53 years of age and had been employed by defendant for over 30 years, with 27 years seniority. For several years prior to October of 1976 she had done a commendable job for defendant as a "cord board" switchboard telephone operator manually connecting lines and taking calls by pulling a cord and plugging it into a switch. She is unmarried, lives with her mother, whom she supports with her retarded, ineducable child. These circumstances were known to respondent.

By 1976 most manual cord board operators' positions, including the petitioner's, were being phased out in favor of automation which made telephone directory assistance computerized. Petitioner was placed in a training program alleged to be inadequate under the circumstances in light of her age and experience, to help her to learn the new work. One such program consisted of six weeks training course during which time there was an exposure of petitioner to three different trainers and techniques for two weeks each. Respondent alleged petitioner did not pass this training program. The test scores were not shown to her. Petitioner felt that though she had been able to learn the theory of the new system she needed more practical experience. Up to this point, the thought or suggestion of retirement had not ever been contemplated by either petitioner or respondent.

On December 15, 1976 petitioner was informed by a training supervisor of defendant as follows: "Your evaluation today was bad. We are forcing you out on retirement." On December 17, 1976 petitioner pleaded to have a cord board type job from defendant which still

maintained some manual-type switchboards. She was offered a similar type manual switchboard job but about 35 miles away from her home, which she declined because she didn't drive a car, she did not want to be too far from her retarded child and mother, and the job would have likewise been phased out anyway within about one more year.

In fact, respondent maintained another manual switchboard office which was not closing where petitioner could have been a cord board operator. However, it was the policy of defendant that no one with less than 30 years of service for defendant could work at that facility. While petitioner had 33 years of service with respondent, she had only 27 years seniority, because of a few years' interruption of her service in approximately 1949.

According to unrebutted deposition testimony of a union steward for the telephone operators, various pressures were brought to bear on "old timers" via inadequate retraining, verbal discouragements and actual threats of forced retirement if unable to meet certain unobtainable standards.

Petitioner was placed on "forced" retirement in accordance with defendant's pension plan.

Petitioner filed suit alleging that she had been terminated because of her age in violation of the Age Discrimination in Employment Act. The District Court granted summary judgment for defendant finding that petitioner was retired pursuant to the terms of a bona fide pension plan which was not "under the holding in *McMann*, a subterfuge to avoid the purposes of the ADEA." (A copy of the opinion is attached hereto as Appendix "B"), in the face of the surrounding facts.

Petitioner appealed this decision to the United States Court of Appeals for the Seventh Circuit. On April 27, 1979, after having heard oral argument of petitioner only, the court announced from the bench that the judgment appealed from was affirmed. (Appendix "A").

REASONS FOR GRANTING WRIT

In affirming the judgment of the District Court, the United States Court of Appeals has decided an important question of federal law which has not been but should be settled by the United States Supreme Court, and has, in effect, made it virtually impossible for an aggrieved individual to bring an action under the Age Discrimination in Employment Act where there is a genuine dispute whether an individual was "fired" or "involuntarily retired" under a pension plan.

A large class of aged and aging American workers will be foreclosed from protection afforded by the 1978 Amendments unless the Supreme Court hears this case.

ARGUMENT

I.

PETITIONER HAS BEEN PRECLUDED FROM EVEN PRESENTING ANY EVIDENCE OF AN AGE DISCRIMINATION CLAIM UNDER § 623(A)(1) BY VIRTUE OF A SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT BECAUSE OF DEFENDANT'S "DEFENSE" THAT PETITIONER WAS RETIRED INVOLUNTARILY ACCORDING TO A BONA FIDE RETIREMENT PLAN.

What is the purpose of having the law if one can not even present evidence of an existing cause of action under it?

Crowlishaw v. Armstrong Rubber Co., 450 F.Supp. 148 (1978) (E.D.N.Y.) illustrates this point specifically. That case also involved an involuntary early retirement according to a pension plan. The plaintiff, attempting to bring an age discrimination claim, was apparently prepared to present his evidence that his termination was motiviated or controlled by his age. Defendant employer made a motion for summary judgment. The court stated:

> "Although the data indicate that on any view of the law defendant's prospects at a trial on the merits are very high, the question on the present motion is not that. It is whether, in the light of the statute and controlling case law, the involuntary early retirement of an employee pursuant to the terms of a regularly established and long-standing pension plan . . . can ever be found to be unlawfully discriminatory discharge under ADEA."

The court did not find *United Airlines, Inc. v. McMann*, 1977, 434 U.S. 192, 98 S. Ct. 444, 54 L.Ed.2d 402 to settle the point. The *United* pension plan was one which required retirement at age 60 and did not involve a question of early retirement at the employer's option.

Nor did the court, in reviewing *Zinger v. Blanchette*, 3rd Cir. 1977, 549 F.2d 901, agree with the concept that early retirement at company option, although obviously a discrimination based on age, was not a violation of ADEA.

While retirements, related to the infirmities of age present one justification for pension planning and early retirement provisions, a retirement system used to cut payroll costs without reference to considerations relevant to retirement and pension planning and without reference to whether each of the employees should or should not have been retired does not justify involuntary early retirement. The court in concluding the issue stated:

> "The statute does not enact any presumption that the discharge of a person between the ages of 45 and 65 is treated as discrimination by reason of age unless the employer shows the contrary. The burden of proof is on the employee to show that the discharge was based on age and not cause or some other licit consideration . . . whatever else § 623(f)(2) is intended to accomplish, it can not be supposed to legitimate dismissals of entire age groups by reason of age without consideration of individual job fitness by taking advantage of early retirement options presumably designed to accommodate individual variances within a scheme entered on a stated normal retirement age. The very widespread inclusion in pension plans of early retirement provisions suggests that the use of forced early retirement to lighten payroll costs by forcing older, higher paid employees into retirement is very far from what the Congress had in mind when it said that it was not unlawful for an employer 'to observe the terms of a bona fide . . . retirement plan, which is not a subterfuge to evade the purposes of this chapter."

Summary judgment was denied in this case with the finding that § 623(f)(2) did not mean that every involuntary early retirant under a pension plan who received a substantial retirement allowance was automatically outside the ADEA. The plaintiff was entitled to present his proof of age discrimination.

A similar sentiment was expressed by the Court in *Havelich v. Julius Wile & Sons, Inc.*, 445 F.Supp. 919 (S.D.N.Y.) 1978. Here the Court reasoned that to prevent a plaintiff, who was involuntarily retired from presenting his evidence that the retirement was really a discharge because of his age, constitutes use of a pension plan as a "subterfuge to evade the purposes of the Age Act." The involuntary retirement in effect forecloses an age discrimination claim.

Petitioner's evidence of age discrimination consists of the fact that deliberately inadequate retraining by defendant was the reason that her training level was not up to par and that her training level was the basis of defendant's decision to place her on involuntary retirement. When an employer's decision to discharge a plaintiff is based on the training level of the plaintiff and when, in turn, training level is directly related to the age of the employer, then use of training level as the basis of a discharge decision constitutes age discrimination. *Coates v. National Cash Register Co.*, 433 F. Supp. 655 (W.D. Va. 1977).

Therefore, by virtue of the foregoing reasoning, petitioner should not have been precluded on a summary judgment against her from presenting her evidence of age discrimination.

II.

THE 1978 AMENDMENTS TO THE ADEA ARE APPLICABLE TO PETITIONER'S 1976 TERMINATION AND WOULD AFFECT A LARGE CLASS OF PERSONS INTENDED BY CONGRESS TO BE PROTECTED.

In holding that the 1978 amendments to the Act are not applicable to the petitioner's 1976 termination the United States Court of Appeals for the Seventh Circuit is in conflict with *Davis v. Boy Scouts of America*, 457 F. Supp. 665 (D.N.J. 1978). In this case the Court held that by the amendment, Congress meant to overturn decisions interpreting the Act so as to allow involuntary or mandatory retirement on the basis of a "bona fide" pension plan.

> "It was felt that this was necessary to protect the inchoate rights of employees to full benefits under their pension plans. Initially, it appeared that the plaintiff was seeking a retroactive application of the amendment upon reflection, however, it appears that what is being suggested is that I apply the law which is currently in effect when I make my decision. Congress has seen fit to change the interpretation of the ADEA given by the Supreme Court in *United Air Lines v. McMann*, 434 U.S.192, 98 S.Ct. 444, 54 L. Ed.2d 402 (1977), to comport with what it says was its original intent. This change, in the state of the law, is analogous to a reversal by the Supreme Court of an earlier decision in that the inferior federal courts become bound to apply the law as revised, not as it was sometime earlier. *Bradley v. Richmond School Bd.*, 416 U.S. 696, 710-16, 94 S.Ct. 2006, 40 L. Ed.2d 476 (1974)."

Under the amendments, pension plan provisions in effect prior to the date of enactment are not exempt under § 4(f)(2), H.R. Rep. No. 95-950, 95th Cong., 2nd Session 1978. In deciding whether to retire an employee,

an employer cannot lawfully consider only the employee's age. This would comport with the Congressional intent in overturning *McMann, supra* which held at 424 U.S. 195 that where § 4(f)(2) applies, it is in error to require a showing of "some economic or business purpose other than arbitrary age discrimination."

Under the amendments which apply to petitioner's termination, petitioner has raised a material question of fact as to whether she was involuntarily retired because of her age. Therefore, summary judgment was inappropriate.

III.

WHETHER THE AMOUNT OF BENEFITS TO AN INVOLUNTARY RETIREE IS SUBSTANTIAL SO AS NOT TO BE A SUBTERFUGE TO A QUESTION OF FACT.

In *Zinger v. Blanchette*, 549 F.2d 901 (3rd Cir. 1977), cert. den., 434 U.S. 1008 (1978) it states "the parties concede that the plan is bona fide and the payment not unreasonable—certainly not so small as to brand the plan a subterfuge to evade purposes of the Act." Therefore the adequacy of the pension payments goes to the issue of whether the retirement plan is really a subterfuge to evade the purposes of the Act.

"Evidence sufficient to sustain a finding of subterfuge would have to establish that the retirement benefits payable to the retired employee were unsubstantial or, if substantial, that continued payment thereof was likely to be jeopardized," *Walker Manufacturing Co. v. Industrial Commission of Wisconsin*, 27 Wis. 2d 669, 135 N.W. 2d 307 (1965). The court in *Walker*, also indicated that it would be a subterfuge of the age act to deprive employees of the earnings which are necessary to maintain a just and decent standard of living, thereby committing grave injury to them.

When Karijolic was employed she was receiving $220.00 a *week* net pay. Karijolic's *monthly* pension payment under the plan is only $215.51. By virtue of the inadequate pension payments she is being deprived of a just and decent standard of living. If Karijolic can establish that in fact the benefits were unsubstantial this then would be evidence of a subterfuge of the ADEA. Therefore, it is a material question of fact as to whether the payment of benefits under Bell's plan is so unsubstantial as to constitute subterfuge to evade the purposes of the ADEA.

CONCLUSION

For the foregoing reasons, which illustrate that summary judgment is improper in this case, this petition for a *writ of certiorari* should be granted.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

(Argued April 27, 1979)

April 30, 1979.

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LEONARD PAGE MOORE, *Senior Circuit Judge**
Hon. ROBERT A. SPRECHER, *Circuit Judge*

ADELINE KARIJOLIC,

Plaintiff-Appellant,

No. 78-2274 *v.*

ILLINOIS BELL TELEPHONE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-C-1951—**Stanley J. Roszkowski**, *Judge.*

[UNPUBLISHED PER CURIAM ORDER]

The Court, having read the briefs, addressed itself to the record, heard oral argument on behalf of the

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* Senior Circuit Judge Leonard Page Moore of the United States Court of Appeals for the Second Circuit is sitting by designation.

appellant, and conferred at the bench, announced in open court that the judgment appealed from is AFFIRMED.

There is no material dispute that the plaintiff's termination occurred pursuant to the terms of a bonafide retirement plan that was not a subterfuge to evade the purposes of the Age Discrimination Act. The case is controlled by *United Airlines v. McMann*, 434 U.S. 192 (1977), and summary judgment for the defendant was appropriate. The 1978 amendments to the Act are not applicable to the plaintiff's 1977 termination.

Accordingly, the Clerk of this Court is directed to enter judgment AFFIRMING the judgment appealed from.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 C 1951

ADELINE KARIJOLIC,

Plaintiff,

v.

ILLINOIS BELL TELEPHONE COMPANY,

Defendant.

ORDER

This matter is before the court on defendant's motion for summary judgment.

Plaintiff, Adeline Karijolic, filed a complaint against her employer, Illinois Bell Telephone Company ("Illinois Bell") alleging she was discharged from employment by defendant in violation of the Age Discrimination in Employment Act ("ADEA") as amended, 29 U.S.C. § 621. Jurisdiction is invoked pursuant to 28 U.S.C. § 626.

The following facts are not in dispute. Plaintiff was born on June 20, 1923. She began working for defendant in 1946 and continued to work at Illinois Bell until she resigned in 1956. In 1959 she resumed working for defendant. For several years prior to October 1976, plaintiff was an operator at Illinois Bell's Irving office. When the Irving office closed on October 8, 1976, plaintiff was transferred to defendant's Hanson Park directory assistance office. She was placed in training since the job at the Hanson Park office involved

different work than that performed by plaintiff at Irving. She was advised that she had not passed the training and thereafter defendant sent her to its Ontario TSPS office, where plaintiff was also given training for a new job. She did not pass this training program either. On December 17, 1976, plaintiff was offered a job by James Propones, a manager for defendant Illinois Bell's Wheaton office, performing the same work she had done at Irving. However, this job would terminate the following October or December, when the Wheaton office closed. Plaintiff declined this job offer. Subsequently, she was placed on retirement by Illinois Bell. At the time she was placed on retirement, February 8, 1977, Karijolic was 53 years old and had 27 years of service for Illinois Bell. According to Section 4.1 of defendant's pension plan, the employer has the option to retire employees who have reached 50 years of age and have at least 25 years of service.

The Illinois Bell Telephone Co. Plan for Employees' Pension, Disability Benefits and Death Benefits has been continuously in effect since its adoption in 1913 and is a qualified plan within the meaning of Section 401 of the I.R.S. Code. The Plan as initially adopted (1913) provided in Section 1, that employees who met the particular age and length of service requirements specified could be retired at the option of the company. In 1946 the provision was amended to require approval of the Benefit Committee to retire an employee at the option of the company. The present language of Section 4.1(a) was adopted on October 1, 1971.[1] (Aff. Herron ¶ 6, Exhibits B, C, D, defendant motion for summary judgment). Defendant's Benefit Committee, pursuant to Section 4.1 of the Plan, place Karijolic on a service pension. (Aff. Herron, ¶7).

On June 1, 1977, plaintiff filed her complaint alleging that Illinois Bell "intentionally, knowingly, voluntarily, wrongfully and unlawfully discharged [her] because of her age . . ." In its Answer, defendant denied plaintiff was discharged and affirmatively stated she was retired

pursuant to a bona fide employee benefit plan which was not a subterfuge to evade the purposes of the ADEA and, therefore, the ADEA was not violated.

Illinois Bell contends that the retirement of plaintiff did not violate ADEA because it fell within the exception contained in Section 4(f)(2) of the Act. That section provides:

> "It shall not be unlawful for an employer . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan which is not a subterfuge to evade the purpose of this [Act], except that no such employee benefit plan shall excuse the failure to hire any individual. . . . 29 U.S.C. § 623(f)(2).

In *United Airlines v. McMahon*, ... U.S. ....., 97 U.S.Ct. ....., 16 F.E.P. 147, the Supreme Court held that a bona fide retirement plan which was in effect before the ADEA cannot be a subterfuge to evade the ADEA. The court stated:

> "We find nothing to indicate Congress intended wholesale invalidation of retirement plans instituted in good faith before its [ADEA] passage, or intended to require employers to bear the burden of showing a business or economic purpose to justify bona fide pre-existing plans as the Fourth Circuit concluded. In ordinary parlance, as in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem or artifice of evasion. In the context of this statute, "subterfuge" must be given its ordinary meaning and we must assume Congress intended it in that sense."

In *Minton v. Whirlpool Corp.*, 77-1777 (7th Cir. Jan. 24, 1978), this circuit affirmed the granting of a motion for summary judgment in a suit involving involuntary early retirement pursuant to a bona fide pension plan where the plaintiff conceded that the pension plan was

bona fide, that he received benefits pursuant to the plan and the plan was enacted before the enactment of ADEA. See *Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834 (3rd Cir. 1977) *cert. denied*, 46 USLW 3431 (Jan. 10, 1978) and *Zinger v. Blanchette*, 549 F.2d 901 (3rd Cir. 1977), *cert. denied*, 46 USLW 3431 (Jan. 10, 1978), both of which involved involuntary early retirement pursuant to bona fide pension plans.

Plaintiff concedes that defendant's pension plan was a bona fide plan (Plaintiff Answer and Brief in Opposition to Defendant's Motion for Summary Judgment, page 3). It is also undisputed that plaintiff has received monthly pension payments under the plan of $215.15 plus additional benefits. (Aff. John E. Herron, ¶ 8). There is no dispute that the defendants plan was in effect before the enactment of ADEA.

Plaintiff has raised the issue of whether her retirement was voluntary or involuntary. While we recognize the distinction between a voluntary choice made by a retiree and an involuntary retirement at the behest of the company, the issue presented here is whether the distinction would result in a finding of a violation of the Act in one case but not in the other. We hold that it would not, so long as the retirement was pursuant to a bona fide plan.

In *Zinger v. Blanchette, supra*, the court stated:

> "To summarize, involuntary retirement pursuant to a bona fide plan that is not a subterfuge but which requires or permits retirement at age 60 at the option of the employer is not unlawful." 549 F.2d at 910.

See *Minton v. Whirlpool Co., supra.*

Section 4.1(a) of defendant's plan provides that the company, at its option, may retire employees prior to age 65 if the employee meets other requirements. So long as defendant observes the terms of its bona fide

pension plan in retiring an employee, even if the retirement is involuntary, defendant's actions cannot be said to violate the act. *Zinger v. Blanchette, supra; Dunlop v. General Telephone Co.*, 13 F.E.P. 1210 (C.D. Cal. 1976).

It is apparent that plaintiff met the terms of service in Section 4.1(a), was retired pursuant to the terms of a bona fide pension plan which provides that Illinois Bell may retire at its option, and further that this plan is not, under the holding in *McMann*, a subterfuge to avoid the purposes of ADEA.

Because we find that plaintiff was retired pursuant to a bona fide pension plan and that the ADEA was not violated, it is not necessary to reach defendant's alternative grounds for granting the motion.

A motion for summary judgment is appropriate where there are no genuine issues of material fact and as a matter of law the moving party is entitled to judgment. Rule 56, Fed. R. Civ. Pr. After a thorough review of all pleadings, affidavits and the record as a whole, viewing all evidence in the light most favorable to the party opposing motion, we conclude that summary judgment in favor of defendant is appropriate in this case.

We feel this conclusion is perhaps harsh and unfortunate in its effect on the individual plaintiff involved, but unavoidable in light of the current case law.

This case, therefore, is dismissed.

ENTER:

/s/ Stanley J. Roszkowski
Judge United States District Court

Dated: September 7, 1978.

FOOTNOTE

[1] "a. *Service Pension*

Effective January 1, 1976, all employees who have reached the age of sixty-six years (normal retirement age) and whose terms of employment have been fifteen or more years, all employees who have reached the age of fifty-five years and whose terms of employment have been twenty or more years, all employees who have reached the age of fifty years and whose terms of employment have been twenty-five or more years, and all employees regardless of age whose terms of employment have been thirty or more years shall if they so request, or may at the discretion of the Committee, be retired from active service and, upon such retirement, shall be granted service pensions.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Before April 30, 1979

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LEONARD PAGE MOORE, *Senior Circuit Judge**
Hon. ROBERT A. SPRECHER, *Circuit Judge*

ADELINE KARIJOLIC,

Plaintiff-Appellant,

No. 78-2274 *v.*

ILLINOIS BELL TELEPHONE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-C-1951—**Stanley J. Roszkowski,** *Judge.*

[UNPUBLISHED PER CURIAM ORDER]

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this court entered this date.

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* Senior Circuit Judge Leonard Page Moore of the United States Court of Appeals for the Second Circuit is sitting by designation.

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

August 27, 1979.

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LEONARD P. MOORE, *Senior Circuit Judge**
Hon. ROBERT A. SPRECHER, *Circuit Judge*

ADELINE KARIJOLIC,

Plaintiff-Appellant,

No. 78-2274 *v.*

ILLINOIS BELL TELEPHONE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 77-C-1951—**Stanley J. Roszkowski**, *Judge*.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by counsel for the plaintiff-appellant, all members of the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

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* Senior Circuit Judge Leonard P. Moore of the United States Court of Appeals for the Second Circuit is sitting by designation.

Supreme Court, U.S.
FILED
DEC 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-818

ADELINE KARIJOLIC,

Petitioner,

v.

ILLINOIS BELL TELEPHONE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-818

ADELINE KARIJOLIC,

Petitioner,

v.

ILLINOIS BELL TELEPHONE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Illinois Bell Telephone Company files this brief in opposition to Adeline Karijolic's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the district court and the order of the Court of Appeals affirming the judgment of the district court are not officially reported. Both are reprinted in the appendix to the petition.

JURISDICTION

The jurisdictional basis for this appeal is adequately set forth in the petition.

STATUTE INVOLVED

This case involves the Age Discrimination in Employment Act of 1967, 29 U.S.C. §623, as it existed prior to the 1978 Amendment. The language of this provision prior to the 1978 Amendment is set forth in Appendix A.

RESTATEMENT OF QUESTION PRESENTED

Whether the district court properly decided that this case presented no genuine issue of material fact and that defendant was entitled to judgment as a matter of law.

STATEMENT OF THE CASE

In October, 1976, the Irving office of Respondent in Chicago, Illinois, where petitioner had worked as a telephone operator, was closed. As a result, Petitioner was transferred to another Chicago office known as the Hanson Park office (Petition, App., p. 3a). She was placed in training since the work at Hanson Park differed from that she had performed at Irving (Petition, App., p. 4a). Subsequently, Petitioner was advised that she had not passed this training. Respondent then transferred her to its Ontario TSPS office, also located in Chicago, and trained her for a TSPS operator job. Again Petitioner was informed she did not successfully pass the training (Petition, App., p. 4a).

Petitioner was then offered a job at an operator office in Wheaton, Illinois, a Chicago suburb. This job was to last until the Wheaton office closed in late 1977. The Wheaton job involved the same work Petitioner had performed at the Irving office. She at first accepted the job offer, but subsequently decided not to accept the job (Petition, App., p. 4a).

After Petitioner declined the Wheaton job offer, she was placed on retirement with a service pension by Respondent's Benefit Committee, effective February 8, 1977. Pursuant to Respondent's pension plan, Petitioner receives monthly pension payments of $215.51. In addition, as a retiree, she receives medical, dental and life insurance coverage at a monthly cost to the Respondent of $119.13 (Appendix B, p. A4-A5).

Respondent's pension plan has been in effect continuously since its adoption in 1913. The plan is applicable to all employees and is a qualified plan within the meaning of section 401 of the Internal Revenue Code, 26 U.S.C. §401. During 1976 alone, a total of $44,472,000 in pension benefits was paid out under the plan. Since its adoption, the plan has provided for involuntary retirement, at the option of the Company, of employees who, as is true of Petitioner, have reached the age of 50 years and have at least 25 years of service (Appendix B, p. A4).

As a result of her involuntary retirement, Petitioner filed suit against Respondent alleging that her termination was the result of age discrimination. Respondent filed a motion for summary judgment, supported by affidavit, averring that Petitioner's retirement came within the ambit of Section 4(f)(2) in that Petitioner was retired in observance of the terms of a bona fide retirement plan which is not a subterfuge to evade the purposes of the Act. The district court rendered summary judgment in favor of Respondent. On appeal the judgment of the district court was affirmed by the Court of Appeals for the Seventh Circuit.

REASONS FOR DENYING THE WRIT

I.

THIS CASE PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

Contrary to Petitioner's assertion this case does not present an important question of federal law which has not been, but should

be, settled by this Court. Petitioner's retirement was effective on February 8, 1977. In *United Airlines, Inc. v. McMann,* 434 U.S. 192 (1977), this Court held that Section 4(f)(2), as it existed at that time,[1] permitted pre-age 65 retirement, based on age, pursuant to a bona fide retirement plan which is not a subterfuge to evade the purposes of the Act. Effective April 6, 1978, Section 4(f)(2) was amended to preclude involuntary retirement based on age even if done pursuant to a bona fide retirement plan which is not a subterfuge. Pub. L. 95-256, §2(a), Apr. 6, 1978, 92 Stat. 189. As a result of this Amendment, a decision of this Court on the instant case would have no effect whatsoever on any case arising on or after April 6, 1978.

This Court has indicated that in the exercise of "sound judicial discretion", a petition for certiorari is granted only in cases "involving principles the settlement of which is of importance to the public as distinguished from that of the parties. . . ." *Rice v. Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 79 (1954). In *Rice* a writ of certiorari was dismissed as improvidently granted on the sole basis that the passage of a new Iowa law precluded the issue presented by that case from again arising in that state. In *District of Columbia v. Sweeney,* 310 U.S. 631 (1940), this Court denied certiorari on the basis that the tax which was the subject of that case had been "laid under a statute which has been repealed and the question is therefore not of public importance." 310 U.S. at 631. In the subject case a change in the law has similarly negated any public importance which might otherwise have existed. Therefore review by this Court is not warranted.

There is another reason why review of the instant case by this Court is unwarranted. This Court has in *McMann*, already enunciated the criteria to be applied in determining the applicability of Section 4(f)(2) as it existed prior to the 1978 Amendment. There

[1]Pub. L. 90-202, §4(f)(2), Dec. 15, 1967, 81 Stat. 603.

is no reason for the Court to do so again. The instant case was decided by the courts below in conformity to the rationale of *McMann.* In *McMann* this Court held not only that involuntary retirement of employees before age 65 was permitted under the pre-amended Act, but also that the Act was intended to protect bona fide retirement plans which are not a subterfuge to evade the purposes of the Act. Under this Court's holding where a retirement plan met the criteria of being bona fide and not a subterfuge, Section 4(f)(2) provided an exception from the prohibitions against age discrimination contained in the Act.

In determining that summary judgment for Respondent was appropriate, the district court carefully applied the criteria enunciated in *McMann* to the undisputed facts of the instant case. Petitioner conceded in the district court that Respondent's retirement plan was bona fide (Petition, App., p. 6a). With regard to the issue of subterfuge, the district court noted that Respondent's plan had since 1913 provided for retirement, at the option of the Company, of persons of Petitioner's age and years of service (Petition, App., p. 4a). According to *McMann* provisions of a retirement plan adopted long before the Act was enacted cannot be a subterfuge to evade the Act. 434 U.S. at 203. Thus, the district court properly concluded the provision of Respondent's plan involved in the instant case was not a subterfuge.

McMann did not involve, and thus this Court did not explicitly decide, the question of whether Section 4(f)(2) protection extended to early retirement which was at the option of the employer rather than required by the terms of the plan. However, the courts of appeal which have decided the issue have held, without conflict, that the reasoning of the *McMann* decision logically extends to such early retirements. *Zinger v. Blanchette,* 549 F.2d 901 (3rd Cir. 1977), *cert. denied,* 434 U.S. 1008 (1978); *Rogers v. Exxon Research and Engineering Company,* 559 F.2d 834 (3rd Cir. 1977), *cert. denied,* 434 U.S. 1022 (1978), *Marshall v. Hawaiian Telephone Company,* 575 F.2d 763 (9th Cir. 1978);

Minton v. Whirlpool Corporation, 569 F.2d 1012 (7th Cir. 1978).[2] The courts below adopted the same position.

In *Zinger v. Blanchette,* 549 F.2d 901 (3d Cir. 1977), *cert. denied,* 434 U.S. 1008 (1978), an employee was involuntarily retired prior to age 65 pursuant to a retirement plan which allowed the employer, at its option, to retire employees between the ages of 60 and 65. The employee claimed that in choosing to retire him the employer had discriminated against him in violation of the Act. The Third Circuit Court of Appeals, in deciding that case for the employer, stressed the "clear measurable difference between outright discharge and retirement. . . ." 549 F.2d at 905. The court noted that this distinction was reflected in the language of the statute in that discharge because of age was explicitly prohibited but that "[n]o statutory provision explicitly prohibits early retirement on a pension." 549 F.2d at 905.

The *Zinger* court found that a distinction between retirement on a pension and discharge was also reflected in the legislative history of the Act. At subcommittee hearings on the age bill former Secretary of Labor Willard Wirtz tertified that the prohibitions of the bill, which were later incorporated into the Act, were "to extend to individuals in situations *not* covered by established retirement policies. . . ." (Emphasis added). 549 F.2d at 906. Representatives of organized labor testifying at the hearing interpreted the bill as permitting "involuntary retirement of employees under 65 . . . regardless of the age of the employee, subject only to the limitation that the retirement policy or system in effect may not be merely a subterfuge to evade the Act." 549 F.2d at 906-07. In addition, the court relied on the fact that an

[2]In *Marshall v. Hawaiian Telephone,* 575 F.2d 763 (9th Cir. 1978), the court observed that a contrary interpretation would result in an absurdity:

> Were we to adopt the Secretary's approach, we would be advancing the anomalous position that [the employer] would not have violated the Act by forcing retirement on all employees at age 60 but would have violated it by allowing some of them to work past that age. We cannot accept such a result. 575 F.2d at 767.

interpretive bulletin, issued by the Department of Labor nearly contemporaneously with the passage of the Act, interpreted the Act as permitting involuntary retirement "irrespective of age" whether or not the retirement was at the employer's option.[3]

On the basis of the Act, its legislative history, and the contemporaneous interpretation of the Department of Labor, the *Zinger* court held that Congress' intent was not only to prohibit discriminatory hiring and discharge policies but also to protect retirement plans.

In *McMann,* this Court quoted with approval the language in the *Zinger* opinion distinguishing between retirement and discharge as follows:

> There is, however, a clear, measurable difference between outright discharge and retirement, a distinction that cannot be overlooked in analyzing the Act. * * * Congress continued to regard retirement plans favorably and chose therefore to legislate only with respect to discharge. 434 U.S. at 198.

This distinction was, apparently, one upon which this Court relied heavily in reaching its decision in *McMann.* This same distinction provided the ground of decision in *Zinger*; *Marshall v. Hawaiian Telephone Company,* 575 F.2d 763 (9th Cir. 1978); *Minton v. Whirlpool Corporation,* 569 F.2d 1012 (7th Cir. 1978); and in the courts below.

Petitioner claims that even if the foregoing is a proper statement of the law the amount of her retirement benefits is so

[3]The pertinent section of the interpretive bulletin issued by the Department of Labor provided that:

> [T]he Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of Section 4(f)(2). The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not, in and of itself, render an otherwise bona fide plan invalid insofar as the exception contained in Section 4(f)(2) is concerned. 34 F.R. 9709 (1969).

insubstantial that there is an issue of fact as to whether Respondent's plan, as applied to her, was a subterfuge to evade the purposes of the Act. Thus, according to Petitioner, summary judgment should not have been granted (Petition, p. 12).

Petitioner's claim flies in the face of this Court's decision in *McMann.* There the term "subterfuge", as used in the Act, was held to have its ordinary meaning of a "scheme, plan, stratagem, or artifice of evasion." 434 U.S. at 203. The record contains no hint that Respondent changed its plan so as to reduce benefits payable to older persons after the Act was passed. Nor is there any indication in the record that Respondent attempted to avoid its obligation to provide Petitioner with all the benefits she was entitled to under its retirement plan. Therefore, Petitioner clearly cannot establish the existence of a subterfuge within the meaning of the Act as construed by this Court in *McMann.*

Moreover, the benefits paid to Petitioner under Respondent's retirement plan are not so insubstantial as to amount to a discharge in disguise. Under its plan, Respondent is obligated to provide benefits to Petitioner amounting to $334.64 per month for the rest of her life. In ten years time, Respondent must, under the terms of its retirement plan, pay Petitioner over $40,000. This is clearly sufficient to establish that Petitioner's termination was a retirement and not a discharge. Thus, under the rationale of *McMann,* and its progeny, Petitioner's retirement was not covered by the prohibitions of the Act.

II.

NO IMPORTANT QUESTION OF FEDERAL LAW IS PRESENTED BY PETITIONER'S CLAIM THAT THE 1978 AMENDMENT APPLIES TO PETITIONER'S 1977 RETIREMENT

Petitioner claims that the 1978 Amendment to the Act should be applied to her 1977 retirement. Petitioner argues that this

Court's decision in *Bradley v. Richmond School Board,* 416 U.S. 696 (1974), requires this result. Petitioner points to one district court decision which supports her argument. *Davis v. Boy Scouts of America,* 457 F. Supp. 665 (D.N.J. 1978).[4] There is no court of appeals decision which conflicts with the determination of the Seventh Circuit in the instant case, that the 1978 Amendment does not apply to a 1977 retirement.

This Court's decision in *Bradley* involves facts which are very different from those in the instant case. Moreover, even if the *Bradley* rationale is utilized in this case, it is clear that the 1978 Amendment should not be applied to a retirement occurring in 1977.

In *Bradley* the issue was the entitlement of the plaintiffs in a school desegregation case to reasonable attorneys' fees. While this issue was pending on appeal Congress enacted a statute providing for the award of attorneys' fees to prevailing plaintiffs in school desegregation cases. In holding that the newly enacted statute should be applied to entitle plaintiffs to attorneys' fees, this Court emphasized the fact that this would involve "no change in the substantive obligation of the parties." 416 U.S. at 493. In the instant case, the issue is precisely what are the substantive obligations of Respondent under the Act. The 1978 Amendment has resulted in a major change in the substantive obligations of Respondent under the Act vis-a-vis the substantive obligations as judicially determined under the unamended Act. Thus, the *Bradley* rationale has no application to the instant case.

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[4]There is no court of appeals decision, other than that of the Seventh Circuit herein, which involves this issue. The majority of district courts which have considered the issue have rejected applying the 1978 Amendment to pre-amendment retirements. *Marshall v. Delaware River and Bay Authority,* 471 F. Supp. 886 (D. Del. 1979); *Marshall v. The Baltimore and Ohio Railroad Company,* 461 F. Supp. 362 (D. Md. 1978); *Marshall v. Atlantic Container Line,* 18 FEP Cases 1167 (S.D.N.Y. 1978).

Moreover, even if the *Bradley* principle is applied it is clear that the decision of the Seventh Circuit Court of Appeals holding that the 1978 Amendment does not apply to this case is correct. The principle stated in *Bradley* is as follows:

> [A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary. 416 U.S. at 711.

In the instant case the legislative history establishes beyond doubt that Congress did not intend that the 1978 Amendment be applied to retirements which occurred prior to the effective date of that Amendment.

Senator Williams, the floor and conference manager of the 1978 Amendment, in reply to a question about the effect of the Amendment on a retirement which occurred before the effective date of the Amendment, answered as follows:

> The bill is not retroactive. The question of mandatory retirements prior to the effective date of this bill will be determined by the court's interpretation of existing law. 123 Daily Cong. Rec. A17304, October 19, 1977.

The House Committee report reflects the same view. The report contains a table indicating when the various prohibitions contained in the Amendment take effect. The report indicates that the prohibition against pre-age 65 mandatory retirement takes effect "upon enactment." H. R. Rep. No. 537, 95th Cong., 1st Sess. 9 (1977). Petitioner's argument that the 1978 Amendment applies to this case ignores the clear intent of Congress.

Even without regard to this clear expression of a contrary Congressional intent the 1978 Amendment should not be applied to this case. This Court recognized in *Bradley* that a newly enacted law or amendment may not be applied to a case which arose prior to enactment where to do so would result in "manifest

injustice." 416 U.S. at 491. This is precisely such a case. Respondent in planning its personnel actions was certainly entitled to rely on those judicial and administrative interpretations of Section 4(f)(2) which ultimately were determined by this Court to be correct. A change in Respondent's obligations after the fact, which potentially exposes Respondent to substantial civil liability for conduct judicially determined to be lawful when it occurred, would amount to manifest injustice.

CONCLUSION

For all of the reasons above stated, Respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

STATUTES INVOLVED

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

§623. Prohibition of age discrimination

Employer practices

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

* * *

Lawful practices; age as occupational qualification; other reasonable factors; seniority system; employee benefit plans; discharge or discipline for good cause

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement,

pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual; or

(3) to discharge or otherwise discipline an individual for good cause.

Pub. L. 90-202, §4, Dec. 15, 1967, 81 Stat. 603.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ADELINE KARIJOLIC,
Plaintiff,
v.
ILLINOIS BELL TELEPHONE COMPANY
Defendant.

CIVIL ACTION
NO. 77 C 1951

AFFIDAVIT OF JOHN E. HERRON

John E. Herron, being first duly sworn, on oath deposes and states as follows:

1. My name is John E. Herron. I reside at 4247 Harvey Avenue, Western Springs, Illinois. Since May 1, 1971, I have been employed as the Assistant Secretary, Employees' Benefit Committee (hereinafter called the "Committee") with the Illinois Bell Telephone Company.

2. Illinois Bell Telephone Company's Plan for Employees' Pensions, Disability Benefits and Death Benefits (hereinafter called the "Plan"), which is applicable to all employees, is funded solely by the Company and is administered by the Committee. The Plan is a qualified pension plan within the meaning of Section 401 of the Internal Revenue Code.

3. As Assistant Secretary of the Committee I have general responsibility, under the direction of the Secretary of the Committee, for all benefit matters acted upon and approved by the Committee. Such matters include the retirement of employees on a pension. I have responsibility as custodian of documents, papers, and other records of the Plan and the Committee. I also have responsibility for record keeping, including statistics, concerning action taken by the Committee under the Plan.

4. During the period from January 1, 1976 through December 31, 1976, a total of $110,637,498 was paid into the pension fund of the Plan. During the same period a total of $44,472,000 in pension benefits was paid out under the Plan.

5. Section 4.1 of the Plan, entitled "Pensions," provides, inter alia, that the Committee has the option to retire employees who have reached the age of 50 years and who have a term of employment of at least 25 years. A true and correct copy of the Plan which was in effect at the time of the retirement of Adeline Karijolic, the plaintiff herein, has been attached as Exhibit A.

6. The Plan has continuously been in effect since its adoption on January 1, 1913. A true and correct copy of the original Plan has been attached as Exhibit B. The Plan as initially adopted, provided in Section 1, that employees who meet the particular age and length of service requirements specified (e.g., 50 years old with 25 years of service) could be retired at the option of the Company. This provision continued unchanged until January 1, 1946, when the Plan was amended so that the approval of the Committee rather than the President or Vice-President was required to retire an employee at the option of the Company. A true and correct copy of this provision as it read after the change in 1946 is attached as Exhibit C. The present language of Section 4.1(a) was adopted on October 1, 1971. A true and correct copy of the provision as amended in 1971 is attached as Exhibit D.

7. In accordance with the terms of Section 4.1, the Committee placed Adeline Karijolic on retirement, effective February 8, 1977, on a service pension.

8. Adeline Karijolic's monthly pension payment under the Plan is currently $215.51. In addition, as a retiree, Ms. Karijolic receives the following benefits:

Benefits	Monthly Cost to the Company
Basic Medical Expense Insurance	$ 81.08
Dental Plan	11.91
Extraordinary Medical Expense Insurance	21.34
Group Life Insurance	4.80
Total	$119.13

The foregoing statements are all true to my best knowledge, information and belief.

/s/ JOHN E. HERRON

John E. Herron

SUBSCRIBED and SWORN to before me this day of December, 1977.

Notary Public